Nos. 78-575, 78-597, and 78-604

In the Supreme Court of the United States

OCTOBER TERM, 1978

SOUTHERN RAILWAY COMPANY, PETITIONER

v.

SEABOARD ALLIED MILLING CORP., ET AL.

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

SEABOARD ALLIED MILLING CORP., ET AL.

SEABOARD COAST LINE RAILROAD COMPANY, ET AL., PETITIONERS

v.

SEABOARD ALLIED MILLING CORP., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (A. 303-316) is reported at 570 F.2d 1349. The decisions of the Interstate Commerce Commission (A. 284-285, 286-291) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1978. The Commission's timely petition for rehearing was denied on May 12, 1978 (A. 317-318). Mr. Justice Blackmun extended the time for filing petitions for a writ of certiorari to October 9, 1978. The petitions were filed on October 6, 1978 (No. 78-575) and October 10, 1978 (Nos. 78-597 and 78-604).[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 2350(a).

QUESTION PRESENTED

Whether an Interstate Commerce Commission decision not to investigate a proposed rail rate increase in advance of its effectiveness is judicially reviewable.

STATUTES INVOLVED

On October 17, 1978, the President signed Public Law No. 95-473, 92 Stat. 1337, which revised, codified, and enacted without substantive change the Interstate Commerce Act and related laws as subtitle

[1] October 9 fell on a legal holiday. See Rule 34(1) of the Rules of this Court.

IV of Title 49, United States Code. Section 3(a) of Pub. L. No. 95-473, 92 Stat. 1466, provides that the language of the recodification "may not be construed as making a substantive change in the laws replaced."

In the statutory appendix to this brief, *infra*, pp. 1a-10a, we have set forth the text of 49 U.S.C. 10707 and 11701, as well as the provisions they replaced, former Sections 15(8) and 13(1) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 15(8) and 13(1).

STATEMENT

This case involves the reviewability of an Interstate Commerce Commission order declining to suspend or investigate a proposed seasonal rate increase for the rail transportation of grain. The court of appeals held that it could properly review the agency's decision not to investigate the proposed rates in advance of their effectiveness, and it remanded the case to the Commission with directions to institute the investigation. We submit that the Commission's order is not reviewable.

A. Statutory Framework

The ratemaking scheme for railroads under the Interstate Commerce Act functions this way. A proposed rate change ordinarily must be filed with the Commission at least 30 days before it becomes effective. 49 U.S.C. 10762(c)(3) (formerly Section 6(3)). The Commission, either on its own initiative or on the basis of a complaint (or "protest"), "may

begin a proceeding * * * to determine whether the proposed rate * * * violates this subtitle." 49 U.S.C. 10707(a) (formerly Section 15(8)(a)).

The Commission must complete such a proceeding (or "investigation") and make a final decision no later than seven months after the rate was to become effective (unless the Commission reports to Congress that it needs more time, in which case it may take an additional three months). 49 U.S.C. 10707(b)(1) (formerly Section 15(8)(a)).[2] In certain specified circumstances, the Commission may suspend the effectiveness of the proposed rate pending final action in the investigation. 49 U.S.C. 10707(c)(1) (formerly Section 15(8)(b)).[3]

If the Commission declines to suspend or investigate, and the proposed rate takes effect, an affected person has a further remedy under the statute. He may file with the Commission a complaint concerning an allegedly unlawful rate (or any other violation of

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[2] If the Commission fails to make a final decision within the applicable time period, the rate may thereafter be set aside only if the proceeding was begun on the basis of a complaint. 49 U.S.C. 10707(b)(2) (formerly Section 15(8)(a)).

[3] If the Commission does not suspend a rate increase that is the subject of an investigation, it must order the railroad to keep account of all amounts received under the increase and to refund any part of the increase found to be unjustified. 49 U.S.C. 10707(d) (formerly Section 15(8)(e)).

The investigation and suspension provisions of Section 10707 are applicable only to railroads. Section 10708 (formerly Section 15(7)) contains similar provisions applicable to nonrail carriers. See *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978).

the statute). 49 U.S.C. 11701(b) (formerly Section 13(1)). If, in response to the complaint, the carrier makes reparation for the alleged injury, it is relieved of further liability to the complaining party for the alleged violation.[4] But if the carrier fails to satisfy the complaint, the Commission *must* begin an investigation unless the complaint states no "reasonable grounds for investigation and action." 49 U.S.C. 11701(b) (formerly Section 13(1)).[5]

If, "after a full hearing," the Commission finds that a rate is unlawful, it may prescribe the lawful rate and it may order the carrier to stop charging the unlawful rate. 49 U.S.C. 10704(a)(1) (formerly Section 15(1)). The Commission may also award damages for any injury suffered by the complaining party. 49 U.S.C. 11705(b)(2) and (c) (formerly

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[4] Former Section 13(1) provided expressly for such relief from liability. The recodification omitted that language in favor of a general requirement that, before the Commission begins an investigation under Section 11701, it must give the carrier "notice of the investigation and an opportunity for a proceeding." 49 U.S.C. 11701(a). See H. R. Rep. No. 95-1395, 95th Cong., 2d Sess., p. 184 (1978). No substantive change was intended. See p. 2, *supra*.

[5] Former Section 13(1) expressly imposed on the Commission a "duty * * * to investigate the matters complained of" unless there was no reasonable ground for an investigation. The "duty" language was omitted in the recodification as "unnecessary" in view of the Commission's general obligation to carry out the statute. H. R. Rep. No. 95-1395, *supra*, p. 184. No substantive change was intended. See p. 2, *supra*. Section 11701(b) of the recodified Act accordingly authorizes the Commission to dismiss a complaint only if it fails to state reasonable grounds for an investigation.

Sections 8 and 9). The Commission's final order in a complaint proceeding determines the lawfulness of the carrier's rate and is subject to judicial review.[6]

B. The Commission's Decisions

In 1976, Congress directed the Commission to establish standards and procedures to permit railroad rates "based on seasonal, regional, or peak-period demand for rail services."[7] The aims were to give shippers an incentive to reduce peak-period shipments, to generate additional revenues for the railroads, and to make better use of the national supply of freight cars.[8]

In August 1977, in accordance with the Commission's newly adopted regulations (49 C.F.R. 1109.10), the Southern Freight Association proposed, on behalf of railroads operating in the South, a 20 percent seasonal rate increase for the transportation of 29 specified grains, to be effective from September 15 to December 15, 1977. This was one of the first "demand-sensitive" rate filings under the 1976 legislation.

Respondents protested these rate increases, alleging that the rates would be unjust and unreasonable,

[6] As an alternative to filing a complaint with the Commission, an affected person may bring a civil action to recover damages suffered as a result of a carrier's violation of the statute. 49 U.S.C. 11705(c)(1) (formerly Section 9).

[7] Section 202(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 36, now codified as 49 U.S.C. 10727.

[8] *Ibid.*

unjustly discriminatory, and unduly prejudicial, in violation of former Sections 1(5), 2, and 3(1) of the Interstate Commerce Act,[9] and also that the rates would violate the long-and-short haul provisions of former Section 4 (A. 159-160, 195-198, 243-246, 281-283).[10] Respondents sought rejection of the tariffs or suspension of their operation pending an investigation.

The Commission found "no valid reason" to reject the tariffs (A. 284), and it declined to suspend their operation or to institute an investigation into their lawfulness under former Section 15(8)(a) (A. 286-290).

The Commission found that respondents failed to support their assertions that the proposed rates would be unreasonably high, unjustly discriminatory, or unduly prejudicial (A. 288-289). Although respondents offered examples purporting to demonstrate departures from the long-and-short haul provisions of former Section 4 (A. 160, 244, 283), the Southern Freight Association presented arguments in rebuttal (A. 273). The railroads assured the Commission that, as they became aware of any potential Section

[9] Now 49 U.S.C. 10701(a) and 10741(a) and (b).

[10] Former Section 4 is now 49 U.S.C. 10726. It provides that a railroad may not charge more for the transportation of similar property "for a shorter distance than for a longer distance over the same line or route in the same direction (the shorter distance being included in the longer distance) * * *." 49 U.S.C. 10726(a)(1). In "special cases," however, the Commission may, on application by a carrier, authorize departures from the long-and-short haul prohibition. 49 U.S.C. 10726(b) and (d).

4 violations resulting from the proposed rates, the carriers would file appropriate tariff changes "to remove any possibility of a Fourth Section violation actually occurring" (A. 293; see A. 287-288). Although the Commission concluded that respondents' assertions concerning possible Section 4 violations were not a sufficient basis for suspending the tariffs, it "admonished" the railroads to fulfill their commitment "to take prompt action to remove [Section 4] violations * * *, if any, * * * that may be caused by application of [the proposed] demand-sensitive rates" (A. 288).

In declining to suspend or investigate the proposed rates, the Commission took account of the clear Congressional purpose "to establish a regulatory climate conducive to rate innovation and experimentation" (A. 289), the temporary nature of the proposed rate increase, and the availability, to parties who may be adversely affected, of an alternative remedy by complaint under former Section 13(1) of the Act (*ibid.*). To ensure that it would be kept apprised of the actual impact of the rate increase that it was allowing to take effect, the Commission ordered the railroads "to make weekly reports * * * demonstrating the effect of the schedules" (*ibid.*).

C. The Court Of Appeals' Decision

Respondents filed petitions for judicial review of the Commission's orders.[11] The court of appeals va-

[11] The court of appeals initially granted a temporary stay of the Commission's orders, delaying the effectiveness of the proposed rate changes (A. 295). Following the submission of

cated the orders and remanded the cases for further proceedings, directing the Commission to institute an investigation into the lawfulness of the tariffs under former Section 15(8) (A. 303-316).

The Court characterized the "critical issue" before it as "whether jurisdiction exists to review the propriety of the Commission's termination of its investigation of the lawfulness of the proposed tariff" (A. 309). Although it declined to review the Commission's decision not to suspend the tariff in question (A. 308-310), the court of appeals concluded that it could properly review the Commission's decision not to investigate the lawfulness of the tariffs under former Section 15(8)(a) of the Act (A. 310-316).[12]

The court bottomed its holding on several considerations. First, it believed that this Court's decision in *City of Chicago* v. *United States*, 396 U.S. 162 (1969)—which held reviewable a Commission decision to terminate an investigation—supported the reviewability of the Commission's determination here not to institute an investigation (A. 311). Sec-

briefs and oral argument on the question of a stay pending review, the court dissolved its temporary stay and allowed the rates to take effect (A. 298-300). It ordered the railroads, however, to keep account of the charges collected under the increased rates "to enable prompt determination of overcharges should the contentions of petitioners prevail upon review" (A. 300).

[12] The court expressly disagreed (A. 313-314) with both the conclusion and the reasoning of the contrary decision of the United States Court of Appeals for the District of Columbia Circuit in *Asphalt Roofing Manufacturers Ass'n* v. *Interstate Commerce Commission*, 567 F.2d 994 (1977).

ond, although it recognized that an adversely affected party could compel a Commission investigation of the rates by filing a complaint under former Section 13 (1) of the Act, the court apparently considered that remedy inadequate because it believed that the Commission would consider in a complaint proceeding only "whether the rate as applied is discriminatorily prejudicial or illegal" (A. 312), and because "in § 13(1) proceedings the burden is on the party challenging the lawfulness of the rate," whereas "[i]n a § 15(8) proceeding the burden is on the railroad to establish the lawfulness and the reasonableness of the tariff" (*ibid.*). Third, the court believed that the Commission's refusal to initiate an investigation under Section 15(8) "made the proposed tariff operative and placed it in effect" (A. 313) and was "equivalent to a finding of lawfulness of the tariffs" (A. 314).

The court of appeals concluded that "[i]t is the duty of the Commission in rate proceedings to investigate substantial issues relating to the lawfulness of the proposed tariff" (A. 312), that "the Commission was derelict in its responsibility in refusing to pursue the investigation of the substantial charges of illegality which were made" in this case (A. 312-313), and that "the Commission's premature termination of its investigation of the § 4(1) charge" requires a remand "for an adequate investigation" (A. 315). The court directed the Commission on remand "to investigate the charges of patent illegality," to hold prompt hearings on the charges, to make detailed

findings and conclusions, and to provide for appropriate refunds if the tariffs are found to be unlawful (A. 316).[13]

SUMMARY OF ARGUMENT

I

The principles that control this case are found in *City of Chicago* v. *United States*, 396 U.S. 162 (1969). The Court there held reviewable a Commission order terminating on the merits an investigation previously begun under a section of the Act that is comparable to former Section 15(8). The Court was careful to distinguish, however, between an order terminating an investigation and one refusing to begin an investigation. The decision whether to *begin* an investigation "is of course within [the Commission's] discretion, a matter which is not reviewable" (396 U.S. at 165).

The court of appeals fell into error not because it overlooked *City of Chicago* but because it misconceived the Commission's action in this case. Contrary to the court of appeals' understanding, the Commission here refused to *begin* an investigation; it did not *terminate* an investigation previously begun. Under *City of Chicago*, the agency's decision is not judicially reviewable.

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[13] The court of appeals denied the Commission's petition for rehearing and suggestion for rehearing en banc (A. 317-318).

After this Court granted the petitions for certiorari, the Commission, with the approval of the court of appeals, ordered that further proceedings on remand be held in abeyance pending this Court's disposition of the cases.

II

The Administrative Procedure Act authorizes judicial review except where "statutes preclude judicial review" or where "agency action is committed to agency discretion by law." 5 U.S.C. 701(a). Both exceptions apply here.

A. The entire statutory scheme affords clear evidence that Congress intended to preclude judicial review of a no-investigation decision.

(1) Former Section 15(8)'s permissive language (the Commission "may" investigate a proposed rate), particularly in contrast with former Section 13(1)'s mandatory language (the Commission has a "duty" to investigate any non-frivolous complaint), is a persuasive indication that Congress did not intend to provide judicial review. *Schilling* v. *Rogers*, 363 U.S. 666, 674 (1960).

(2) Former Section 13(1) provides a fully adequate *administrative* mechanism by which a person may compel a Commission investigation. The availability of that remedy makes it unlikely that Congress would have provided a *judicial* remedy to accomplish the same result.

A person need only file a complaint in order to trigger the Commission's obligation to investigate and to determine the lawfulness of a challenged rate. The Commission may consider in such an investigation any issue that could be raised in a Section 15(8) investigation, and it is empowered to issue a cease and desist order and to award reparations to compensate for any injury. The agency's decision not to begin an investigation under Section 15(8) in advance of a rate's effectiveness resolves no issue and forecloses no argument with respect to the rate's lawfulness.

This alternative administrative remedy is potent evidence that Congress intended to preclude judicial review. *Morris* v. *Gressette*, 432 U.S. 491, 505-507 (1977).

(3) The Commission must begin an investigation under former Section 15(8) prior to the rate's effectiveness, and must complete it within seven months after the effective date (or ten months in special situations). The time limit for completing such an investigation was added by Congress in 1976 to combat regulatory delay.

Judicial review of a decision not to investigate under former Section 15(8) would collide with these time limits and would defeat the underlying legislative policy. A court order directing the Commission to start a Section 15(8) investigation would require beginning the proceeding long after the rate took effect and would almost certainly entail continuing the investigation long past the clear statutory deadline. This Court has held that judicial review is precluded where it would unavoidably extend a statutory time limit and compromise a Congressional policy of rapid government action. *Morris* v. *Gressette, supra*, 432 U.S. at 503-505.

(4) If judicial review were available, it could complicate and disrupt the normal processing of a complaint under former Section 13(1). If, after a Section 13(1) investigation had been started (or com-

pleted), a court were to order an investigation under Section 15(8), the result would be either duplicative parallel proceedings or an aborted Section 13(1) proceeding, particularly if different parties were involved in the two proceedings. Although the allocation of the burden of proof in the two proceedings differs, merely reassigning the burden in an ongoing or completed investigation might be unfair. Since the placement of the burden of proof can shape trial strategy, changing the rules in the middle of the game could cause serious problems. These practical considerations suggest that the ratemaking scheme Congress erected for railroads was not designed to accommodate judicial review of a no-investigation decision under Section 15(8).

(5) Congress intended to extinguish all judicial power to oversee the Commission's preliminary rate review function. Any review of a Commission decision not to investigate a rate would unavoidably propel a court into a consideration of the rate's reasonableness and lawfulness, and would therefore risk a "forbidden judicial intrusion into the administrative domain." *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 670 (1963). The court of appeals' decision in this case is illustrative. The court repeatedly characterized as "substantial" the charge that the rates in issue were "patent" violations of former Section 4 of the Act. It also volunteered that it had serious questions about whether the rates might be discriminatory. This premature judicial speculation about the lawfulness of rates is inconsistent with the Congressional purpose in giving the

Commission exclusive power to determine the lawfulness of rates in the first instance.

The rationale of this Court's decisions strongly implies that a Commission decision not to *suspend* a rate is unreviewable. The same rationale also precludes review of an exercise of the closely related power to *investigate.*

It is of no consequence that a complaining party alleges that the challenged rates are "patently" illegal. Reviewability of an agency decision not to investigate should not be made to turn on the label that a party affixes to its claim. Nor is the Commission's decision any the more reviewable when a rate is alleged to violate the long-and-short haul provisions of former Section 4. Those provisions are of no higher status than the Act's prohibition of unreasonable or discriminatory rates. Indeed, the Commission is authorized in special cases to waive the Section 4 prohibition but not the others.

B. Former Section 15(8) provides that the Commission "may" begin an investigation of a proposed rate's lawfulness, but it furnishes no standards to restrict the Commission's exercise of that discretion and no criteria by which a reviewing court can judge the propriety of the Commission's decision. The Act does not specify any circumstances in which the Commission is required to investigate. This is one of those rare situations where a statute is " 'drawn in such broad terms that in a given case there is no law to apply.' " *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971).

As in *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309 (1958), the Commission's decision whether to investigate is controlled by "large or loose statutory terms" and "involve[s] nice issues of judgment and choice, * * * which require the exercise of informed discretion" (356 U.S. at 318, 317). Here, as in that case, it is fair to "infer that the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision" (*id.* at 318).

That conclusion is fortified by a consideration of the speed with which the Commission must act. It receives hundreds of thousands of individual railroad rate filings each year. In most instances, after the filing of protests and replies, the Commission must decide in a matter of days or even hours, and on the basis of only rudimentary information in an informal "record," whether an investigation should be started. Its discretionary judgment in such circumstances necessarily rests in part on the agency's expert feel for a case. The courts are poorly equipped to oversee this tremendous volume of discretionary agency judgments.

Contrary to the court of appeals' assumption, former Section 15(8) does not impose on the Commission a duty to investigate "substantial issues" concerning a rate's alleged unlawfulness. The probability of a rate's lawfulness or unlawfulness is an important but not controlling factor in the Commission's determination. It may also take into account the nature and extent of the alleged violation, the injury that may result to the public and the parties,

the suitability of the alternative Section 13(1) remedy, any overriding Congressional or agency policy, and the extent of its available resources.

It was on the basis of just such considerations that the Commission decided in this case not to investigate the proposed seasonal rate increase. In the absence of statutory standards by which a court can measure the agency's complex judgment, "the controversy * * * is not one appropriate for judicial action" (*Panama Canal Co., supra,* 356 U.S. at 317).

ARGUMENT

AN INTERSTATE COMMERCE COMMISSION DECISION NOT TO INVESTIGATE A PROPOSED RAIL RATE INCREASE IN ADVANCE OF ITS EFFECTIVENESS IS NOT JUDICIALLY REVIEWABLE

I

UNDER THE PRINCIPLES OF THIS COURT'S DECISION IN *CITY OF CHICAGO* v. *UNITED STATES*, THE COMMISSION'S REFUSAL TO START A DISCRETIONARY INVESTIGATION IS NOT SUBJECT TO JUDICIAL REVIEW

This Court's reasoning in *City of Chicago* v. *United States*, 396 U.S. 162 (1969), governs this case.

City of Chicago arose under former Section 13a(1) of the Act (now 49 U.S.C. 10908), which provided, in terms comparable to former Section 15(8)(a), that the Commission "shall have authority" to investigate a carrier's proposal to discontinue the operation of an interstate train. The Commission started an investigation of proposed train discontinuances, found that the discontinuances were justified

under the statutory standard, and therefore terminated the investigation. The question was whether a court could properly review a Commission order terminating on the merits an investigation previously begun under former Section 13a(1).

The court held the order reviewable. Its reasoning, however, sharply distinguished between an order terminating an investigation and an order declining to begin an investigation. The Court held that, "when the Commission undertakes to investigate" a proposed discontinuance, a subsequent decision to terminate the investigation is judicially reviewable just like any other decision on the merits (396 U.S. at 166). A different rule applies, however, to a refusal to begin an investigation. The Court stated: "[w]hether the Commission should make an investigation of a § 13a (1) discontinuance is of course within its discretion, *a matter which is not reviewable*" (*id.* at 165; emphasis added).[14]

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[14] The Court cited for this proposition *New Jersey* v. *United States*, 168 F. Supp. 324 (D.N.J. 1958) (three-judge court), affirmed mem., 359 U.S. 27 (1959). This Court there had affirmed a holding that a Commission decision not to investigate a proposed ferry discontinuance under Section 13a(1) was unreviewable because it was committed by law to the agency's "absolute discretion" (168 F. Supp. at 329).

The Court's reaffirmation in *City of Chicago* of the principle established in *New Jersey* was not, as the Solicitor General suggested at the certiorari stage (Mem. 9, n. 8), a mere "remark in passing." The fact is that the issue was disputed before the Court. The Chicago parties argued that both a refusal to investigate *and* a termination of an investigation are reviewable; the railroad argued that *neither* is reviewable; and the Solicitor General, on behalf of both the United States and the Commission, argued that a refusal to investigate is not reviewable but a termination of an investigation is reviewable. See Nos. 101 and 102, O.T. 1969, Brief for Appellants, p. 20, n. 22; Brief for Appellees, pp. 19-20; Brief for the United States and the Interstate Commerce Commission, p. 10, n. 1; pp. 20-21 & n. 11. The Court agreed with the Solicitor General and resolved the issue in its opinion. If, as the Solicitor General has here stated (Mem. 9, n. 8), the Court's resolution was "dicta," then it was carefully considered dicta supporting the position there embraced by the United States.

The same principles are applicable here. Former Section 15(8), like former Section 13a(1), is permissive, not mandatory.[15] While a decision to *terminate* a Section 15(8) investigation would be judicially reviewable, the decision whether to *begin* such an investigation is committed solely to the Commission's discretion, "a matter which is not reviewable" (396 U.S. at 165).[16]

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[15] Section 13a(1) provided that the Commission "shall have authority * * * to enter upon an investigation * * *." Section 15(8)(a) provided that the Commission "may * * * order a hearing * * *." The language of the recodification is even more nearly identical for the two sections. Under 49 U.S.C. 10908(b), "the Commission may conduct a proceeding" to investigate a proposed train discontinuance. Under 49 U.S.C. 10707(a), "the Commission may begin a proceeding" to investigate a proposed railroad rate change. Section 10908(b) also gives the Commission power—analogous to its rate suspension authority under Section 10707(c)—to require the carrier to continue the train operation for up to four months pending completion of the investigation and a final agency decision.

[16] See also *Union Mechling Corp.* v. *United States*, 566 F.2d 722, 724-725 (D.C. Cir. 1977) (under *City of Chicago*, ICC decision not to begin a discretionary investigation under the Panama Canal Act, former Section 5(16), is not reviewable).

The court of appeals apparently agreed that *City of Chicago* controls this case (A. 311). But its application of the controlling principles to the circumstances of this case is seriously flawed. The court flatly misconceived the Commission's decision, characterizing it repeatedly as an "order *terminating* the investigation" (A. 314, emphasis added; see also A. 308, 309, 310, 311, 312, 313, 315, 316). The Commission in fact declined to *begin* an investigation. It did *not*, as in *City of Chicago*, conclude an investigation that it had previously started.[17]

We submit, therefore, that the Court need look no further than *City of Chicago* to decide this case. Under the principles of that decision, the Commission's discretionary refusal to investigate the seasonal rate increase proposed in this case is not judicially reviewable.

[17] The Commission's consideration of respondents' rate protests and the railroads' replies was to determine *whether* to institute an investigation under former Section 15(8)(a). That threshold consideration did not itself constitute an "investigation," just as the Commission's similar threshold consideration of protests in the *New Jersey* case (see 168 F. Supp. at 328) did not constitute an "investigation" under former Section 13a(1). Under both provisions, "investigation" refers to the proceedings that the statute authorizes the Commission to begin and that can lead to a final decision finding the proposed rate unlawful or the proposed discontinuance unjustified. No such proceeding was begun in this case.

II

THE INTERSTATE COMMERCE ACT PRECLUDES JUDICIAL REVIEW AND COMMITS SOLELY TO THE COMMISSION'S DISCRETION THE DECISION WHETHER TO INVESTIGATE A PROPOSED RATE IN ADVANCE OF ITS EFFECTIVENESS

The *City of Chicago* principles are simply an application of the Administrative Procedure Act's limitations on judicial review of agency action. The APA authorizes judicial review "except to the extent that —(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. 701(a). Both exceptions apply to an ICC decision not to investigate a proposed railroad rate change under former Section 15(8).

A. The Ratemaking Scheme Of The Interstate Commerce Act Is Incompatible With Judicial Review Of A Decision Not To Investigate

No statute expressly prohibits judicial review of a no-investigation decision. The question for this Court, therefore, is "whether nonreviewability can fairly be inferred." *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970); *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977). For while judicial review "will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress," the inquiry into Congressional intent must be made "in the context of the entire legislative scheme * * *." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140, 141 (1967).[18]

[18] See also *Heikkila* v. *Barber*, 345 U.S. 229, 233 (1953) (a statute's "purpose and history as well as its text are to be considered in deciding whether the courts were intended to

The "entire legislative scheme" for railroad rate-making under the Interstate Commerce Act furnishes " 'clear and convincing evidence' " that Congress intended to "restrict access to judicial review." *Id.* at 141.

1. ***The Act's language is permissive.***

In giving the Commission the power to investigate and suspend proposed rates in advance of their effectiveness, Congress used permissive language. Under former Section 15(8)(a), the Commission "may" begin an investigation and "may" suspend a rate pending a final decision. Although the use of permissive language may not by itself overcome the presumption of reviewability, it can "persuasively indicate" a Congressional purpose to preclude judicial review. *Schilling* v. *Rogers*, 363 U.S. 666, 674 (1960).[19]

provide relief for those aggrieved by agency action"); *Attorney General's Manual on the Administrative Procedure Act*, p. 94, n. 4 (1947) ("the courts remain free to deduce from the statutory context of particular agency action that the Congress intended to preclude judicial review of such action").

[19] The Court in *Schilling* held unreviewable a refusal by the Director of the Office of Alien Property to return to a claimant certain property vested by the United States during World War II. The Trading with the Enemy Act provided that the Director "may return" such property if he finds that specified conditions are met. The Court stated that "the permissive terms in which the * * * return provisions are drawn * * * persuasively indicate that their administration was committed entirely to the discretionary judgment of the Executive branch 'without the intervention of the courts' " (363 U.S. at 674).

That inference is fortified where, as in this case, Congress used mandatory language in conferring a related power. The terms of former Section 15(8)(a) stand in contrast to those of former Section 13(1), which provided that, when a complaint is filed *after* a rate has become effective, "it shall be the *duty* of the Commission to investigate the matters complained of" (emphasis added).[20]

2. ***Congress provided an administrative remedy by which a person may compel a Commission investigation of an allegedly unlawful rate.***

a. As the language of former Section 13(1) suggests, the Commission's decision not to begin an investigation of a proposed rate under former Section 15(8) leaves the complaining party free, after the rate takes effect, to compel the Commission administratively to begin an investigation under former Section 13(1). Any person may file a complaint alleging that a railroad is violating the statute by charging an unlawful rate. Unless the railroad satisfies the complaint or the Commission finds that the complaint

[20] As this Court early held, "[i]n the face of this mandatory requirement," the Commission has no alternative "but to investigate the complaint, if it presents matter within the purview of the Act and the powers granted to the Commission." *Interstate Commerce Commission* v. *Baird*, 194 U.S. 25, 39 (1904). The recent recodification of the Interstate Commerce Act eliminated the express reference to the Commission's "duty" to investigate a complaint. 49 U.S.C. 11701. That change does not affect the substance of the Commission's obligation. See note 5, *supra*. Under Section 11701(b), the Commission may dismiss a complaint only if it "does not state reasonable grounds for investigation and action."

states no reasonable ground for investigation (the equivalent of dismissal for failure to state a claim on which relief can be granted), the Commission *must* begin an investigation to determine the lawfulness of the rates.

A refusal to begin such an investigation would be subject to judicial review. A final decision on the merits after completion of an investigation would also be subject to judicial review. See *City of Chicago* v. *United States, supra*, 396 U.S. at 166; *Alton R.R.* v. *United States*, 287 U.S. 229, 240 (1932).

The Commission has broad remedial authority in a Section 13(1) investigation. If it finds that a rate is unlawful, the Commission may prescribe the lawful rate to be charged in the future and may order the railroad to stop charging the unlawful rate. 49 U.S.C. 10704(a)(1) (formerly Section 15(1)). It may also award damages for any injury suffered by the complaining party. 49 U.S.C. 11705(b)(2) and (c) (formerly Sections 8 and 9). See *Interstate Commerce Commission* v. *United States*, 289 U.S. 385, 390-393 (1933).

The availability of this alternative administrative remedy is persuasive evidence that Congress did not intend the courts to review a no-investigation decision under former Section 15(8). It would make little sense to give aggrieved persons access to the courts to compel a Commission investigation of allegedly unlawful rates where the statute permits any person to compel such an investigation merely by filing an administrative complaint under former Section 13(1).

The situation here is similar to that in *Morris* v. *Gressette*, 432 U.S. 491 (1977). The issue there was the reviewability under the APA of the Attorney General's failure to interpose a timely objection under Section 5 of the Voting Rights Act to a change in the voting laws of a jurisdiction subject to the Act.[21] The effect of the Attorney General's failure to object in the case before the Court was to allow South Carolina to implement a proposed reapportionment plan for its State Senate.

The Court concluded, on the basis of the statutory scheme and the legislative history, that Congress intended to preclude judicial review. The Court considered it a significant clue to Congressional intent that the Attorney General's failure to object to a proposed change "is not conclusive with respect to the constitutionality of the submitted state legislation" and does not bar a subsequent private suit attacking the change under the Fifteenth Amendment (432 U.S. at 505).[22]

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[21] The Voting Rights Act forbids States subject to the Act from changing voting standards or procedures without first either (1) obtaining a declaratory judgment from the United States District Court for the District of Columbia that the proposed change has neither the purpose nor the effect of abridging the right to vote on account of race or color, or (2) submitting the change to the Attorney General and receiving no objection within 60 days. 42 U.S.C. 1973c.

[22] The Court distinguished on this basis *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), which held that the courts may review on a limited basis a decision by the Secretary of Labor not to bring a civil action to set aside a challenged union election. Unlike the situation in *Morris* and in the

The fact that Congress passed the Voting Rights Act precisely because of "the perceived inadequacy of private suits under the Fifteenth Amendment" (*ibid.*) did not diminish the importance of the alternative remedy as an indication that Congress intended "to preclude judicial review of Attorney General actions under § 5" (*id.* at 506). The Court concluded (*id.* at 506-507):

> Where the discriminatory character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation. But it cannot be questioned in a suit seeking judicial review of the Attorney General's exercise of discretion under § 5, or his failure to object within the statutory period.

A similar analysis leads to the same conclusion here. If the Commission declines to investigate a proposed railroad rate change under former Section 15(8), an aggrieved person may challenge the rate, after it takes effect, in a traditional complaint pro-

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present case, the Secretary of Labor's decision was conclusive with respect to the election challenge, because, as the Court in *Morris* emphasized, "the statute at issue in *Dunlop* provided that suit by the Secretary of Labor would be the *exclusive* post-election remedy" (432 U.S. at 505, n. 20; emphasis by the Court).

The lower federal courts have also recognized that the availability of an alternative remedy is important evidence of Congressional intent with respect to reviewability and is the critical difference between *Morris* and *Dunlop*. See *Ralpho* v. *Bell*, 569 F.2d 636, 638-639 (D.C. Cir. 1977); *Save the Bay, Inc.* v. *EPA*, 556 F.2d 1282, 1296, n. 15 (5th Cir. 1977).

ceeding under former Section 13(1). But the Commission's decision not to investigate "cannot be questioned in a suit seeking judicial review of the [Commission's] exercise of discretion under" former Section 15(8) (*ibid.*).

b. The court of appeals was aware of the alternative remedy under former Section 13(1) (see A. 312). It discounted the importance of that remedy, however, apparently because of fundamental misconceptions about the effect of a no-investigation decision under former Section 15(8) and the scope of the Section 13(1) remedy.

(i) The court mistakenly believed that the Commission's refusal to begin an investigation under former Section 15(8) "places the proposed tariffs in effect and is equivalent to a finding of lawfulness of the tariffs" (A. 314). In fact, it is the decision not to *suspend* a proposed rate that allows the tariff to take effect. The decision whether to *investigate* has no bearing on the effectiveness of the tariff.

Thus, even if, before the seasonal rate increase in this case became effective, the Commission had instituted the investigation sought by respondents and ordered by the court of appeals, the tariffs would nevertheless have become effective according to their terms on September 15, 1977 (see A. 25). The pendency of an investigation under former Section 15(8) does not in any way disturb the effectiveness of the investigated rate or the railroad's ability to charge and collect that rate.

Nor did the Commission's decision not to begin an investigation determine the lawfulness of the proposed seasonal rate increase. As this Court has stated, the "preliminary [reasonableness] assessment commonly made in suspension orders" does "not represent a final determination by the Commission that any particular rate [is] just and reasonable." *United States* v. *SCRAP*, 412 U.S. 669, 692, n. 16 (1973). The same is true of a decision not to investigate. Neither decision prescribes the rate to be charged or in any way forecloses a subsequent challenge to the rate when it becomes effective.

Although the Commission, in deciding whether to begin an investigation in advance of a rate's effectiveness, ordinarily takes into account the rate's probable lawfulness or unlawfulness, that is only one of several relevant considerations (see pp. 58-60, *infra*). A refusal to investigate, like a refusal to suspend, does not necessarily imply that the Commission believes the rate is lawful. Nor does the rate carry the Commission's endorsement. The refusal to investigate means only that the Commission has decided not to begin a proceeding to determine the lawfulness of the proposed rate in advance of its effectiveness. No disputed issue is resolved, and no argument is foreclosed, with respect to the rate's lawfulness.

In sum, just as the Attorney General's failure to object to a proposed voting change "is not conclusive with respect to the constitutionality" of the change (*Morris* v. *Gressette*, *supra*, 432 U.S. at 505), so the

Commission's decision not to investigate a proposed rate "is not conclusive" with respect to the lawfulness of the rate. In both cases, the issue is left open for final adjudication through alternative methods.[23]

(ii) The court of appeals minimized the Section 13(1) complaint remedy on two grounds: (1) that "[t]he Commission has apparently limited its authority in such cases to the issue of whether the rate as applied is discriminatorily prejudicial or illegal" (A. 312); (2) that "in Section 13(1) proceedings the burden is on the party challenging the lawfulness of the rate," while "[i]n a Section 15(8) proceeding the burden is on the railroad to establish the lawfulness and the reasonableness of the tariffs" (*ibid.*).

We are mystified by the court's first point. The statute plainly permits the filing of a complaint with respect to *any* violation of the Act.[24] No rule or pre-

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[23] It follows that a decision not to investigate a proposed rate lacks the finality that this Court's "pragmatic" analysis ordinarily requires for judicial review of agency action under 5 U.S.C. 704. *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 149. A no-investigation decision is not "definitive" with respect to the rate's lawfulness (*id.* at 151); its impact is neither "direct" nor "immediate" (*id.* at 152); it puts no one "in a dilemma" (*ibid.*); it requires no "immediate and significant change in the [complaining parties'] conduct of their affairs" (*id.* at 153). The decision simply means that an investigation of the challenged rate will not begin before it becomes effective.

[24] Former Section 13(1) provided that any person may complain "of *anything* done or omitted to be done by any common carrier" in violation of the Act (emphasis added). Section 11701(b) of the recodified Act similarly provides that a person "may file with the Commission a complaint about a

cedent restricts the Commission's authority under Section 13(1) to issues of discrimination. A complaining party may raise in a Section 13(1) complaint any issue that it can raise in a Section 15(8) protest of a proposed rate—including alleged violations of the Section 4 long-and-short haul prohibition. That is so regardless of whether the complaining party can demonstrate direct injury. The statute expressly precludes dismissing a complaint "because of the absence of direct damage to the complainant." 49 U.S.C. 11701(b) (formerly Section 13(1)).

Contrary to the court of appeals, therefore, the scope of the Commission's jurisdiction under Section 13(1) is identical to that under Section 15(8).

It is true that the burden of proof in the two proceedings differs as to some issues. The APA establishes the general principle that "the proponent of a rule or order has the burden of proof" unless a statute provides otherwise. 5 U.S.C. 556(d). The Interstate Commerce Act provides specifically that, in an investigation begun under former Section 15(8), "the burden is on the carrier proposing the changed rate * * * to prove that the change is reasonable." 49 U.S.C. 10707(e) (formerly Section 15(8)(f)).[25] In an investigation begun under former Section 13(1), on the other hand, the general APA principle applies, and the complaining party bears the burden of showing that the challenged rate is unlawful.[26]

That difference between a Section 15(8) investigation and a Section 13(1) investigation does not make the Section 13(1) remedy inadequate. Nor does it reduce the significance of the remedy as an indication of Congressional intent to preclude judicial review of a refusal to begin a Section 15(8) investigation. In *Morris* v. *Gressette*, *supra*, the Court gave full weight to the availability of a private suit to

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violation of this subtitle * * *." Neither the old nor the new language contains any limitation on the nature of the violation that may be subject to a complaint.

[25] On the issue of the proposed rate's reasonableness, the carrier bears both the burden of going forward and the burden of persuasion. See *Atchison, T. & S. F. Ry.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 813 (1973); *Atchison, T. & S. F. Ry.* v. *United States*, 279 U.S. 768, 773 (1929); *Council of Forest Industries* v. *Interstate Commerce Commission*, 570 F.2d 1056, 1059 (D.C. Cir. 1978); *Chicago & E.I. R.R.* v. *United States*, 107 F. Supp. 118, 124 (S.D. Ind. 1952), affirmed, 344 U.S. 917 (1953).

On issues other than reasonableness—such as alleged discrimination—the carrier bears the burden of persuasion, but the complaining party has the burden of going forward. See *Lake Cargo Coal*, 326 I.C.C. 63, 68-69 (1965), 329 I.C.C. 549, 553-554 (1967); *Increased Rates on Frozen Fruits and Vegetables*, 351 I.C.C. 676, 684 (1976).

[26] See *Atchison, T. & S.F. Ry.* v. *Wichita Bd. of Trade*, *supra*, 412 U.S. at 812, 814; *Swift & Co.* v. *United States*, 343 U.S. 373, 382-383 (1952); *Louisville & N. R.R.* v. *United States*, 238 U.S. 1, 11 (1915); *ASG Industries, Inc.* v. *United States*, 548 F.2d 147, 152 (6th Cir. 1977). If the complaining party makes a prima facie showing, the burden of going forward shifts to the railroad to justify the challenged rate. *Ibid.*; see *Atchison, T. & S.F. Ry.* v. *United States*, 218 F. Supp. 359, 374-375 (N.D. Ill. 1963); *International Minerals & Chemicals Corp.* v. *Atchison, T. & S.F. Ry.*, 303 I.C.C. 603, 607 (1958); *Lobdell-Emery Manufacturing Co.* v. *Ann Arbor R.R.*, 156 I.C.C. 568, 570 (1929).

challenge a change in voting procedures (432 U.S. at 505-507), even though the burden of proof would shift from the State under the Voting Rights Act to the complaining party in a private suit under the Fifteenth Amendment. See *Georgia* v. *United States*, 411 U.S. 526, 536-539 (1973).[27]

Moreover, whatever practical significance the placement of the burden of proof may have in other contexts (see p. 38, *infra*), we are dealing here with alleged violations of the long-and-short haul provision of former Section 4. The court of appeals directed the Commission to begin a Section 15(8) investigation of respondents' charges that the seasonal rate increase was patently illegal under Section 4 (A. 315). The conduct of that investigation would not be materially different from a Section 13(1) investigation, which respondents could have triggered simply by filing a complaint with the Commission. In either case, once the complaining party has shown that the railroad, without permission, has published a higher rate for a shorter haul on the same line, the burden of going forward would shift to the railroad to show that the rate in fact does not violate the statute.[28]

[27] "The very effect of § 5 [of the Voting Rights Act] was to shift the burden of proof with respect to racial discrimination in voting. Rather than requiring affected parties to bring suit to challenge every changed voting practice, States subject to § 5 were required to obtain prior clearance before proposed changes could be put into effect. The burden of proof is on 'the areas seeking relief.'" *Georgia* v. *United States*, *supra* 411 U.S. at 538, n. 9.

3. *The statute contains strict time limits for the decision whether to begin a Section 15(8) investigation and for completing such an investigation.*

The Act provides that a carrier-made rate may take effect 30 days after it has been published, filed with the Commission, and held open for public inspection. 49 U.S.C. 10762(c)(3) (formerly Section 6(3)). The Commission's power to investigate and suspend a proposed rate under former Section 15(8) must be exercised before the 30-day period expires. The very purpose of the power was to "giv[e] the Commission 'full opportunity for . . . investigation' *before* the tariff became effective." *United States* v. *Chesapeake & Ohio Ry.*, 426 U.S. 500, 513 (1976) (*Chessie*) (emphasis by the Court).

If the Commission begins such an investigation, it must complete it and issue a final decision "by the end of the 7th month after the rate * * * was to become effective," unless it reports to Congress that it cannot make a final decision within that period, in which case it may take an additional three months. 49 U.S.C. 10707(b)(1) (formerly Section 15(8)(a)). These deadlines were added in 1976 by the 4R Act (see note 2, *supra*) because of Congressional

[28] See *Patterson* v. *Louisville & N. R.R.*, 269 U.S. 1, 12 (1925); *Davis* v. *Portland Seed Co.*, 264 U.S. 403, 424 (1924); *Westinghouse Electric Corp.* v. *New York Central R.R.*, 318 I.C.C. 277, 279-280 (1962); *Sun Oil Co.* v. *Central R.R. of N.J.*, 301 I.C.C. 558, 560 (1957).

concern over "excessive regulatory delay" that "erode[s] the confidence of the public in needed regulation"; one of the principal aims of the Act was to "expedite the regulatory process." S. Rep. No. 94-499, 94th Cong., 1st Sess., p. 15 (1975).

Judicial review of a decision not to begin an investigation under former Section 15(8) would interfere with these time limits and would conflict with the Congressional purpose behind them. If a court were to find that a Section 15(8) investigation should have been started by the Commission months earlier, the agency would be compelled, long after the railroad's rate has become effective, to begin a proceeding that under the statute may be started only "*before* the tariff became effective." *Chessie*, *supra*, 426 U.S. at 513. And the Commission almost certainly would be disabled from completing such an investigation, as the statute plainly commands, within seven (or ten) months after the rate has become effective. 49 U.S.C. 10707(b)(1).

That is precisely the result of the court of appeals' judgment in this case. On February 16, 1978—five months after the Commission decided not to investigate and after the seasonal rates took effect—the court of appeals ordered the Commission to begin a Section 15(8) investigation. Three more months passed before the court disposed of a timely petition for rehearing and issued its mandate. For the Commission to begin at that stage an investigation that by statute was required to be *completed* a month earlier would compound the very problem of "excessive regulatory delay" that Congress sought to eliminate in the 4R Act. S. Rep. No. 94-499, *supra*, p. 15.

This Court has held in analogous circumstances that a statutory mandate for rapid government action may imply a Congressional intent to preclude judicial review. In *Morris* v. *Gressette*, *supra*, the statute provided that a covered jurisdiction may implement a change in voting practices if it submits the change to the Attorney General and if "the Attorney General has not interposed an objection within sixty days after such submission." 42 U.S.C. 1973c. There, as here, "the legislative materials * * * indicate a [Congressional] desire to provide a speedy" procedure (432 U.S. at 503). "Although there was to be no bar to subsequent constitutional challenges to the implemented [voting changes] * * *, there was also to be 'no dragging out' of the extraordinary federal remedy beyond the period specified in the statute" (*id.* at 504). The Court concluded that, "[s]ince judicial review of the Attorney General's actions would unavoidably extend this period, it is necessarily precluded" (*id.* at 504-505).[29]

The Court need not find that the Commission's power to suspend and investigate a proposed rate in advance of its effectiveness is as "extraordinary" or "severe" as the Section 5 remedy under the Voting

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[29] See also *Langevin* v. *Chenango Court, Inc.*, 447 F.2d 296, 303 (2d Cir. 1971) (Friendly, J.), where the court identified, as a factor suggesting non-reviewability, "the need for expedition to achieve the Congressional objective."

Rights Act (*id.* at 501, 504) in order to draw an analogy to this case.[30] For the legislative purpose is quite plain on the face of the statute: a Section 15(8) investigation is to be started in advance of a rate's effectiveness and completed within seven (or ten) months after it was to take effect. Since judicial review "would unavoidably extend th[ese] period[s]" (432 U.S. at 505), it should be precluded.

4. *Judicial review would significantly complicate the statute's ratemaking procedures.*

Even aside from the unavoidable conflict between judicial review and the statutory time limits, other aspects of the ratemaking procedure would be unduly complicated if a Commission decision not to investigate under former Section 15(8) were subject to review.

a. When the Commission investigates but does not suspend a proposed railroad rate increase, it must require the railroad to keep account of all amounts received under the increase until the Commission completes the investigation, "or until 7 months after the increase becomes effective, whichever occurs first," and it must order the railroad to make refunds of any portion of the increase ultimately found to be unjustified. 49 U.S.C. 10707(d) (formerly Section

[30] We note, however, that the Court has characterized the suspension mechanism as "a particularly potent tool" and "a 'tremendous power.'" *Chessie, supra*, 426 U.S. at 513; *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 641 (1978). The power to investigate in advance of a rate's effectiveness is closely linked to, and must be construed together with, the power to suspend (see pp. 44-47, *infra*).

15(8)(e)). The accounting of amounts received must specify "by whom and for whom the amounts are paid." *Ibid.* This substantial bookkeeping burden is essential if the railroad is to be in a position to make appropriate refunds "to the person for whom the amounts were paid."

When the Commission decides not to investigate a proposed rate, it has no basis for imposing a keep account requirement on the railroad. If a court were to review that decision and order the Commission to begin such an investigation, the statutory accounting mechanism would be unavoidably disrupted. The Commission might impose such a requirement for the period of the late-started investigation, but that would leave a gap between the rate's effectiveness and the start of the railroad's accounting, and it would compromise the plain language of the statute, which terminates the accounting requirement seven months after the rate becomes effective (or ten months if the proceeding is extended). If, as in this case, the reviewing court (rather than the Commission) were to impose an accounting order pending judicial review and final agency decision (A. 300), that would risk subjecting the railroad needlessly to the substantial bookkeeping burdens associated with such an order if the Commission's decision were upheld. It might also result in extending the duration of the accounting requirement beyond the statutory seven month period.

If statutory provisions and legislative policy must be bent and stretched to accommodate judicial review, one may reasonably infer that Congress intended to foreclose review.

b. The availability of judicial review could also disrupt the normal process of handling investigations begun under former Section 13(1).

Once a rate takes effect, a person may file a complaint and compel the Commission to begin an investigation under that section. It is quite possible that a Section 13(1) proceeding could be started, or even completed, before a court decided whether the Commission should have begun an investigation under former Section 15(8). What then would be the remedy? Must the Commission conduct a parallel investigation while the 13(1) case goes forward? Must it abandon the 13(1) proceeding and restart a proceeding under 15(8)?

It may not be enough simply to allow a 13(1) proceeding to continue but with the burden of proof shifted to the railroad. The burden of proof in rate proceedings can influence a party's trial strategy and development of affirmative evidence. To change the ground rules in the middle of the game—or after the game is over—could be unfair. Parties can be expected in these circumstances to ask for a new hearing.

The risk that such a change in the rules might occur and that a new hearing might not be granted would doubtless induce *all* parties to approach the 13(1) proceeding on the assumption that the burden could fall on them. The result is that the hearings in such cases may be significantly expanded, trial strategies distorted, and evidentiary procedures confused.

It is fair to assume that Congress could not have intended to impose these extra burdens on the Commission or the public.

5. Congress intended to withdraw the courts from involvement in the Commission's threshold investigation and suspension determinations.

a. The Commission's authority to investigate and suspend railroad rates under former Section 15(8) is derived from former Section 15(7), which was added to the Interstate Commerce Act in 1910 by the Mann-Elkins Act (36 Stat. 552). Under the original Act of 1887, the Commission had the power under Section 15, after an investigation under Section 13, to set aside unlawful rates and to award reparations for any injury sustained by the complaining party (24 Stat. 384). But it had no power to prescribe a lawful rate [31] or to investigate or suspend a rate in advance of its effectiveness. See *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 639 (1978) (*TAPS*).

The Hepburn Act of 1906 gave the Commission power to prescribe maximum rates for the future (34 Stat. 589), but that power could be exercised only with respect to a rate that was in effect. As a consequence, "the only relief against unreasonable rates lay in the reparations remedy * * *." *TAPS*, *supra*, 436 U.S. at 640.

In the Mann-Elkins Act of 1910, Congress granted the Commission power to investigate a rate before it

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[31] See *Interstate Commerce Commission* v. *Cincinnati, N.O. & T.P. R. Co.*, 167 U.S. 479 (1897).

takes effect and suspend the rate's effectiveness for up to 10 months pending completion of the investigation (36 Stat. 552).[32] The Act's legislative history has been documented in this Court's opinions. See *Arrow Transportation Co.* v. *Southern Ry.*, *supra*, 372 U.S. at 662-669; *Chessie*, *supra*, 426 U.S. at 512-513; *TAPS*, *supra*, 436 U.S. at 639-642.

A theme that emerges vividly from that history is that Congress intended to extinguish judicial power to intervene in preliminary rate assessments. One of the problems that led to the Mann-Elkins Act was that, in the absence of authority in the Commission to suspend rates, shippers sought injunctive relief in the courts. The courts had split on whether they had jurisdiction to grant such relief, and even those that believed they had the necessary power "were reaching diverse results, which engendered confusion and produced competitive inequities." *Arrow*, *supra*, 372 U.S. at 663. This "equity litigation * * * led to discrimination in rates * * * in the situation in which shippers successful in court would be paying one charge while those who were unsuccessful, or who did not have the wherewithal to go to court or to post an injunction bond, were paying higher charges." *TAPS*, *supra*, 436 U.S. at 641. Congress dealt with this

[32] The maximum suspension period was reduced to five months by the Transportation Act of 1920 (41 Stat. 486-487) and extended to seven months in 1927 (44 Stat. 1447-1448). See *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 665-666 (1963). Not until the 4R Act of 1976 did Congress impose separate time limits on the Commission's *investigation* of a proposed railroad rate.

problem by "vest[ing] in the Commission the sole and exclusive power to suspend and * * * withdraw[ing] from the judiciary any pre-existing power to grant injunctive relief." *Arrow*, *supra*, 372 U.S. at 667.

b. This Court accordingly held in *Arrow* that the courts have no authority to extend the statutory suspension period by enjoining a rate's effectiveness until the Commission completes a Section 15 investigation. "[I]t would be anomalous if a Congress which created a power of suspension in the Commission because of the dissonance engendered by recourse to the injunction nevertheless meant the judicial remedy to survive" (372 U.S. at 668). The Court perceived "a clear congressional purpose to oust judicial power" with respect to rate suspensions (*id.* at 671, n.22).

The Court's conclusion was "buttressed by a consideration of the undesirable consequences which would necessarily attend the survival of the injunction remedy" (*id.* at 669). Among those undesirable consequences was the inevitable prospect that courts would consider at the threshold ratemaking stage the "claim that the carrier's proposed rates are unreasonable" (*id.* at 670). That sort of rate assessment "could create the hazard of forbidden judicial intrusion into the administrative domain" (*ibid.*) and would jeopardize the Congressional objective of ensuring uniformity in the rate review function (*id.* at 671).

Ten years later, in *SCRAP*, *supra*, the Court extended *Arrow* to prohibit a court from requiring the

Commission to suspend a rate during the statutory suspension period. The Court stated (412 U.S. at 692):

> The injunction constitutes a direct interference with the Commission's discretionary decision whether or not to suspend the rates. It would turn *Arrow* into a sheer formality * * * if a federal court could accomplish by injunction against the Commission what it could not accomplish by injunction directly against the railroads.

Finally, in *TAPS, supra*, which held that "courts have jurisdiction to review suspension orders to the limited extent necessary to ensure that such orders do not overstep the bounds of Commission authority," the Court "reaffirm[ed] our previous holding that courts may not independently appraise the reasonableness of rates" (436 U.S. at 638-639, n.17).

c. Although the Court has not expressly so held, its decisions leave little doubt that the courts are without jurisdiction to review the Commission's discretionary decision whether to suspend a proposed rate. Any such review of a suspension decision would entail some consideration of the rate's reasonableness and would risk a "forbidden judicial intrusion into the administrative domain" (*Arrow, supra*, 372 U.S. at 670). A court order setting aside a suspension or a refusal to suspend would constitute, even more clearly than in *SCRAP*, "a direct interference with the Commission's discretionary decision whether or not to suspend the rates" (412 U.S. at 692). If the courts could accomplish by reviewing the Commission's order

what they clearly could not accomplish by injunction, both *Arrow* and *SCRAP* would be reduced to "sheer formalit[ies]" (*ibid.*). Review of the merits of a suspension decision—as opposed to the Commission's jurisdiction to enter it (*TAPS, supra*)—must be foreclosed if the "clear congressional purpose to oust judicial power" is to be honored (*Arrow, supra*, 372 U.S. at 671, n.22).

Even before this Court's decision in *Arrow*, several three-judge district courts had held that a Commission decision not to suspend a rate is unreviewable.[33] The Court in *Arrow* cited some of these decisions with approval for the proposition that "courts consistently decline to suspend rates when the Commission has refused to do so, or to set aside an interim suspension order of the Commission" (372 U.S. at 670). See also *SCRAP, supra*, 412 U.S. at 691. After *Arrow*, the courts have considered it settled that a suspension decision is unreviewable.[34]

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[33] See *Freeport Sulphur Co.* v. *United States*, 199 F. Supp. 913, 916 (S.D. N.Y. 1961); *Luckenbach S.S. Co.* v. *United States*, 179 F. Supp. 605, 609 (D. Del. 1959), vacated in part as moot, 364 U.S. 280 (1960); *Coastwise Line* v. *United States*, 157 F. Supp. 305, 306 (N.D. Cal. 1957); *National Water Carriers Ass'n* v. *United States*, 126 F. Supp. 87, 90 (S.D. N.Y. 1954); *Carlsen* v. *United States*, 107 F. Supp. 398, 399 (S.D. N.Y. 1952).

[34] *E.g., Asphalt Roofing Manufacturers Ass'n* v. *Interstate Commerce Commission*, 567 F.2d 994, 1001 (D.C. Cir. 1977); *Port of N.Y. Authority* v. *United States*, 451 F.2d 783, 786-788 (2d Cir. 1971); *National Industrial Traffic League* v. *United States*, 287 F. Supp. 129, 132 (D.D.C. 1968), affirmed

d. The decision whether to begin an investigation under former Section 15(8) is unreviewable (except as to jurisdictional questions) for essentially the same reasons that suspension decisions are unreviewable. As the District of Columbia Circuit correctly concluded in *Asphalt Roofing Manufacturers Ass'n* v. *Interstate Commerce Commission, supra*, there is "no ground, on the basis of the Act, for treating the two powers differently for purposes of reviewability" (567 F.2d at 1002).

The powers were linked from their inception in the Mann-Elkins Act, and they remained linked in the 4R Act's addition of Section 15(8). They are conferred in the same section of the statute in the same permissive terms. The suspension power cannot be exercised independently of the investigation power: a rate can be suspended only if the Commission has begun an investigation, and the suspension can last only as long as the investigation. Although the Commission can investigate a rate without suspending it, the agency makes both decisions at the same time, in the same order, through the same informal procedure, and under the same time constraints.

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mem., 393 U.S. 535 (1969); *Oscar Mayer & Co.* v. *United States*, 268 F. Supp. 977, 981 (W.D. Wisc. 1967).

The courts have reached the same conclusion under similar statutory schemes. See *Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, 455 F.2d 1340, 1345 (D.C. Cir. 1971); *Municipal Light Boards* v. *Federal Power Commission*, 450 F.2d 1341, 1351, n. 21 (D.C. Cir. 1971), certiorari denied, 405 U.S. 989 (1972); *Associated Press* v. *Federal Communications Commission*, 448 F.2d 1095, 1103 (D.C. Cir. 1971).

Statutory powers so closely connected should be construed together. It is not likely that Congress meant to treat suspension decisions and investigation decisions differently for purposes of judicial review. We think the D.C. Circuit was correct in *Asphalt* in concluding that the reviewability of a no-investigation decision is controlled "by the cases holding the Commission's decision whether to suspend a rate increase to be unreviewable" (567 F.2d at 1002).

That conclusion is consistent with the rationale of *Arrow* and *SCRAP*. Congress intended to extinguish judicial power to interfere in the preliminary rate-making judgments that it delegated to the Commission. Reviewing a no-investigation decision, like entertaining an application for an injunction against a rate's effectiveness, would thrust a court inevitably into a consideration of the proposed rate's probable lawfulness or unlawfulness, precisely the sort of "judicial intrusion into the administrative domain" that *Arrow* forbids (372 U.S. at 670).

The court of appeals' decision in this case illustrates the point. Having concluded that it could properly review the Commission's decision not to investigate the railroads' seasonal rate increase, the court undertook to examine the lawfulness of the proposed rates. Although it disclaimed any final judgment on the question (A. 315), it repeatedly characterized as "substantial" respondents' charges that the rates were "patent" violations of the long-and-short haul prohibition (A. 312, 313, 314, 315, 316). The court concluded on this point that the charge

"has sufficient substance" to warrant a formal investigation under Section 15(8) (A. 315).

That itself violates the *Arrow* injunction, for it ventures too far into the Commission's rate assessment domain. But the court did not stop there. It also expressed doubts—but did not translate them into an order to pursue the question on remand—concerning the Commission's analysis of the charge that the rate, because it exempts freight cars not owned by the railroads, will be unlawfully discriminatory. The court concluded that "a serious question arises" concerning the lawfulness of that exemption (*ibid.*).

It was partly to avoid just this kind of premature judicial speculation about proposed rates that Congress gave the *Commission* power to decide whether to suspend or investigate such rates. If, as this Court has repeatedly ruled, "courts may not independently appraise the reasonablenes of rates" at the investigation and suspension stage (*TAPS, supra,* 436 U.S. at 639, n. 17), then the decision whether to investigate, just like the decision whether to suspend, cannot be subject to judicial review.

We are aware of only a single reference in the legislative history of the Mann-Elkins Act to the possibility of judicial review of a Commission determination at the suspension and investigation stage: an exchange on the floor of the Senate between Senator Beveridge and Senator Borah (a leading proponent of the Mann-Elkins Act). That exchange—in which Senator Borah confirmed that "the shipper is

not given any right of appeal from the action of the Commission" (45 Cong. Rec. 6786)—supports our position that Congress intended to withdraw the courts from all aspects of the preliminary rate assessment process, including review of the agency's threshold judgments.[25]

e. It is important to emphasize that "[t]his is not a case in which it is charged either that an administrative official has refused or failed to exercise a statutory discretion, or that he has acted beyond the scope of his powers, where the availability of judicial review would be attended by quite different considerations than those controlling here." *Schilling* v. *Rogers, supra,* 363 U.S. at 676-677. Although respondents have clothed their arguments in jurisdictional garb—charging "patent illegality" of the tariffs under the "absolute prohibition" of Section 4, "blatant failure" of the Commission to fulfill a "duty" to investigate,

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[25] The exchange followed a colloquy in which Senator Borah assured Senator Overman that a finding in a Section 15 investigation that a rate is lawful would not foreclose a shipper who was not a party to that proceeding from filing a Section 13 complaint challenging the same rate (45 Cong. Rec. 6786):

> MR. BEVERIDGE: Mr. President, in this controversy, where the commission is on one side and the railroad on the other, is not the commission supposed to take care of the interests of the shipper? Is it not supposed that the commission will look after the interests of the shipper?
>
> MR. BORAH: The other portion of the measure is built on that theory, because the shipper is not given any right of appeal from the action of the commission.

and "blatantly unlawful" Commission action [36]—their creative use of adjectives cannot camouflage the fact that the Commission exercised a statutory discretion plainly within its jurisdiction and that respondents want this Court to enter the "administrative domain" and review the merits of the Commission's discretionary decision. Cf. *Schilling, supra*, 363 U.S. at 676.

Although the court of appeals apparently attached importance to respondents' allegations that the tariffs in question were "patently illegal" (see A. 314, 315, 316), reviewability should not turn on the label that a protesting party places on its allegations. The court of appeals' approach would simply encourage protesting parties to outdo each other in the patentness of the illegalities they allege. It would then fall to the court of appeals to discriminate, as a threshold jurisdictional matter, between allegations of *truly* patent illegality and allegations that fall short of that standard. The statute need not be interpreted to produce such a bizarre result.

Moreover, the Section 13(1) complaint procedure is available to adjudicate claims of patent illegality no less than claims of latent illegality. See *North Carolina Natural Gas Corp.* v. *United States*, 200 F. Supp. 745, 749 (D. Del. 1961); *Bison Steamship Co.* v. *United States*, 182 F. Supp. 63, 69 (N.D. Ohio 1960). In fact, if a rate's unlawfulness is obvious,

[36] See, *e.g.*, Seaboard Allied Br. in Opp., pp. 6, 9, 15; Board of Trade Reply to Memorandum for U.S., p. 2.

the Section 13(1) procedure should provide speedy relief at minimum cost.[37]

There is no substance to respondents' claims that the prohibitions of former Section 4 are of a higher order of absoluteness than the prohibitions of other sections and that the Commission has some special obligation to enforce the long-and-short haul provision above others. The fact is that the Act's insistence on reasonable and non-discriminatory rates is fully as important as the long-and-short haul provision. Indeed, Congress apparently viewed the Section 4 prohibition as *less* absolute than the others. It gave the Commission power "[i]n special cases" to authorize departures from the Section 4 prohibition (49 U.S.C. 10726(b)), a power it did not give the Commission with respect to the reasonableness and non-discrimination requirements.

[37] The "patent illegality" argument evokes the Commission's power to *reject* for filing a tariff that fails to comport with procedural or formal requirements or that is a patent nullity. See 49 U.S.C. 10762(e) (formerly Section 6(9)); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 347 (1956); *North Central Truck Lines, Inc.* v. *Interstate Commerce Commission*, 559 F.2d 802, 804 (D.C. Cir. 1977). But the Commission found no basis for rejecting the tariffs in this case (A. 284), and the court of appeals did not profess to review the agency's rejection decision. Rather, it reviewed the decision not to investigate a tariff properly accepted for filing, and it ordered the Commission to begin such an investigation, not to reject the tariff (A. 315, 316).

B. The Decision Whether To Investigate Rates In Advance Of Their Effectiveness Is Committed Solely To The Commission's Discretion By Law

The APA exempts from judicial review "agency action * * * committed to agency discretion by law." 5 U.S.C. 701(a)(2). That provision furnishes an independent basis for finding that a decision not to investigate a proposed railroad rate under former Section 15(8) is non-reviewable. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971).

The Court in *Overton Park* found that this "narrow exception" to the principle of reviewability "is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply' " (*ibid.*). Former Section 15(8) is such a statute.

1. *The statute provides no standards to limit the Commission's discretion and no criteria by which a reviewing court can evaluate the propriety of the Commission's decision.*

The Act provides that, when a railroad files a proposed rate, "the Commission may begin a proceeding" to determine the rate's lawfulness. 49 U.S.C. 10707(a) (formerly Section 15(8)(a)). Neither the statute nor its legislative history furnishes any standards for the Commission to apply in making that discretionary decision.[38]

[38] The Act restricts the Commission's authority to *suspend* a railroad rate. It allows suspension only if a verified complaint is filed and only if the complaining party proves that the proposed rate will cause him substantial injury and that he is likely to prevail on the merits. 49 U.S.C. 10707(c) (formerly Section 15(8)(d)). Even that provision, however, simply narrows the Commission's jurisdiction to suspend. It does not limit the Commission's range of discretion *within* its proper jurisdiction.

Former Section 13(1), by contrast, not only provides controlling standards but also makes Commission action mandatory instead of permissive. The Commission has a "duty" under that section to investigate the lawfulness of a challenged rate unless the carrier satisfies the complaint or there is no "reasonable ground" for an investigation. The presence of these limitations in Section 13(1) accentuates their absence from Section 15(8).

The statutes at issue in *Overton Park* are also unlike Section 15(8). They provided that the Secretary of Transportation could not authorize the use of federal funds for construction of highways through parks "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park * * *." 401 U.S. at 411. Those standards could guide the Secretary's decision and provide criteria against which a reviewing court could measure the Secretary's action. The Court accordingly held that there was "law to apply" and that authorization of construction funds was not committed solely to agency discretion within the meaning of the APA (401 U.S. at 413). See also *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), where the statute provided that the Secretary of Labor "shall" investi-

gate a complaint about a union election and, "if he finds probable cause to believe that a violation * * * has occurred," he "shall" bring a civil action to set aside the election. 29 U.S.C. 482(b).

Although former Section 13(1) provides similar standards to guide the Commission's discretion, former Section 15(8) does not. The situation here, therefore, is analogous to that in *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309 (1958), where the Court refused to intrude on an agency's discretion not to begin a ratemaking proceeding similar to the one respondents sought here. The statute "authorized" the Panama Canal Company, as the agent of the President, "to prescribe and from time to time change" tolls for use of the Panama Canal, in accordance with a specified formula. Certain American shipping companies brought suit to compel the Company to exercise its authority to prescribe lower tolls and to refund allegedly illegal tolls collected in the past.

The Court held, under the APA's "committed to agency discretion" provision, that "the initiation of a proceeding for readjustment of the tolls of the Panama Canal is a matter that Congress has left to the discretion of the Panama Canal Co." and is not judicially reviewable (356 U.S. at 317). There, as here, the statute did not limit the agency's discretion in deciding whether and when to begin a proceeding to change tolls, and there was no basis for a court to review the agency's decision. The agency's determination "is far more than the performance of a ministerial act"; it "involve[s] nice issues of judgment and

choice, * * * which require the exercise of informed discretion" (*ibid.*). [W]here the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, * * * [w]e then must infer that the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision" (*id.* at 318).

Section 15(8) similarly contains "large [and] loose statutory terms" that authorize the Commission to investigate a railroad rate in advance of its effectiveness. The Act does not specify any circumstances under which the agency is *required* to begin such an investigation, nor does it give a reviewing court any standard by which to review the "nice issues of judgment and choice" (356 U.S. at 317) that govern the Commission's decision. It follows that this is one of "those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Overton Park, supra*, 401 U.S. at 410.[39]

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[39] See also *Greater N.Y. Hospital Ass'n* v. *Mathews*, 536 F.2d 494, 498 (2d Cir. 1976) ("Because no other standards are set forth according to which the Secretary [of HEW] must exercise his discretion [concerning the timing of payments to providers of Medicare services], a court has quite literally no indicia by which it may evaluate that exercise and hence no power of review under § 701(a)(2)"); *East Oakland-Fruitvale Planning Council* v. *Rumsfeld*, 471 F.2d 524, 533 (9th Cir. 1972) (generality of statutory standard "would not afford a reviewing court a practicable rule for determining the legality of the [OEO] Director's decision to override or not to override" a governor's veto of a proposed grant).

The statute at issue in *City of Chicago* v. *United States*, *supra*, former Section 13a(1) of the Interstate Commerce

2. The speed and informality with which the Commission must act, and the volume of decisions it must make, require reliance on the sort of expert judgment that the courts are not equipped to oversee.

In considering whether agency action is committed solely to agency discretion, the Court may properly take account of the nature of the agency's decision and its suitability for judicial review. See *Panama Canal Co.* v. *Grace Line, Inc., supra*, 356 U.S. at 317. Because of the practical conditions surrounding the Commission's preliminary rate assessments at the investigation and suspension stage—which permit "only a brief and informal hearing" (*Arrow, supra*, 372 U.S. at 672)—the agency must rely on the kind of informed judgment that the courts are ill-equipped to supervise.

A proposed railroad rate change ordinarily may become effective 30 days after it has been published, filed with the Commission, and kept open for public inspection. 49 U.S.C. 10762(c)(3) (formerly Section 6(3)). The statute contemplates that interested parties will have an opportunity during this period to file a protest challenging the rate's lawfulness and asking the Commission to suspend and investigate it. See 49 U.S.C. 10707(a) (formerly Section 15(8)(a)).

Act, provided, like Section 15(8) and like the statute in *Panama Canal Co.*, only that the Commission "shall have authority" to investigate a carrier's proposal to discontinue the operation of an interstate train. It, too, gave no standards for the exercise of that discretion, and the Court confirmed that the Commission's decision whether to begin such an investigation "is of course within its discretion, a matter which is not reviewable" (396 U.S. at 165).

Under Commission regulations, such protests ordinarily must be received by the agency at least 12 days before the rate's proposed effective date. 49 C.F.R. 1100.40(b). A protest must indicate in what way the proposed rate is alleged to be unlawful and must state what the protestant believes is a lawful alternative. 49 C.F.R. 1100.40(a). The protest is considered to be "addressed to the discretion of the Commission." *Ibid.* The railroad may file a reply to a protest no later than the fourth working day before the rate's effective date. 49 C.F.R. 1100.40(f).

The Commission has delegated to its Suspension and Fourth Section Board (composed of three employees) its authority under former Section 15(8) to determine whether to investigate and suspend proposed railroad rate changes. 49 C.F.R. 1011.6(a)(1), 42 Fed. Reg. 65181, 65183 (December 30, 1977).[40] The proceedings before the board are informal. The board makes no transcript, issues no subpoenas, administers no oaths. 49 C.F.R. 1100.200(a). It accepts telegraphic pleadings when circumstances warrant. 49 C.F.R. 1100.40(b), 1100.200(c).

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[40] The statute expressly authorizes the Commission to establish employee boards composed of at least three members and to delegate to such boards authority to dispose of matters before the Commission. 49 U.S.C. 10304, 10305 (formerly Section 17(2)). In delegating its rate suspension and investigation authority to the Suspension and Fourth Section Board, the Commission specified that the board may certify to the Commission for decision any matter assigned to the board. 49 C.F.R. 1011.6.

It is only through such informal procedures that the Commission is able to handle the crushing burden of rate filings that it receives. In fiscal year 1977, for example, the Commission received more than 52,000 tariffs for railroads alone. *1977 ICC Annual Report*, p. 113. Each of these tariffs may contain as few as one or as many as thousands of individual proposed rate changes.[41]

Because the statute requires only 30 days' notice before a railroad rate may be put into effect, and because protests and replies must be filed and considered within that period, the Commission often must reach its judgment as to investigation and

[41] Commission staff estimates that the agency receives hundreds of thousands of individual proposed railroad rate changes each year. The figure is even higher for motor carriers. In fiscal year 1977, the Commission received more than 220,000 motor common carrier tariffs, containing innumerable individual proposed rate changes. *1977 ICC Annual Report*, p. 113.

Protests are filed in a relatively small proportion of cases. In fiscal year 1977, the Commission, in response to protests, considered for possible suspension and investigation 221 railroad tariffs (embracing a far larger number of individual proposed rate changes). *Id.* at 115. It decided to begin a Section 15(8) investigation in 43 cases, and to suspend the tariff's effectiveness pending completion of the investigation in 14 of those cases. *Ibid.* The Commission decided not to investigate or suspend in 141 cases. *Ibid.*

The comparable figures for motor carriers are higher. The Commission considered 1,740 motor carrier tariffs for suspension or investigation; it began an investigation in 578 cases and suspended the proposed rates in 534 of those cases. It decided against suspension or investigation in 925 cases. *Ibid.*

suspension in a matter of hours, acting necessarily on the basis of what Professor Spritzer calls "haste and hunch."[42] As we shall show (pp. 58-60, *infra*), the Commission's discretionary judgment at this threshold stage properly rests on a blend of objective and subjective considerations beyond a mere estimate of the proposed rate's probable lawfulness.

Our point here is that, when a statute requires an agency to act so swiftly on so many matters that it is forced to rely on its expert "feel" for a case in reaching its judgments, it is proper to ask whether the courts are in any position effectively to review those judgments. Does it make sense to ask the courts to oversee hundreds of agency decisions, made without a formal record of any sort, on questions of ratemaking

[42] Spritzer, *Uses of the Summary Power to Suspend Rates: An Examination of Federal Regulatory Agency Practices*, 120 U. Pa. L. Rev. 39, 59 (1971). Professor Spritzer's study revealed that the Suspension and Fourth Section Board is "heavily pressed by the volume of business and the restraints of a tight schedule" and "is often required to act on information that is sketchy at best." *Id.* at 56. The result is that "in some instances the Commission now meets its deadline only by acting without the benefit of adequate information from the proponent and the protesting parties, through a deliberative process that has excessive components of haste and hunch." *Id.* at 59. He proposed legislation that would empower the Commission "to issue a 'stop' order delaying for a brief additional period—twenty days is suggested—the date when a tariff schedule would otherwise become effective," so that "the agency, the carrier, and other affected parties would have opportunity to focus on the matter at hand in a far more productive manner than is feasible under present procedures." *Id.* at 60.

that are poorly suited for judicial review even in the best of circumstances? [43]

We think the answer is no. As in *Panama Canal Co.*, "the controversy * * * is not one appropriate for judicial action" (356 U.S. at 317).

3. *The Commission properly considers a variety of relevant factors in deciding whether to investigate a proposed rate.*

a. When a complaint is filed against an effective rate under former Section 13(1), the Commission is *required* to begin an investigation unless the carrier satisfies the complaint or there is no reasonable ground for an investigation. The only judgment that the statute leaves room for the Commission to make before starting an investigation is whether the unsatisfied complaint presents a non-frivolous claim within the agency's jurisdiction.

The situation is altogether different under former Section 15(8). At the threshold investigation stage, the statute does not limit the Commission's inquiry to whether the protest presents a substantial claim, and the Commission in fact considers—albeit quickly and

[43] See *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 546 (1942):

> The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.

informally—a variety of additional factors relevant to whether an investigation should be ordered.

(i) An important consideration in every case is the probable lawfulness or unlawfulness of the proposed rate. Because of the "sketchy" evidence available at this stage of the ratemaking process, however, the Commission often must rely on its "hunch" concerning the rate's probable unlawfulness.[44] This is particularly true when protesting parties make generalized allegations of unlawfulness that the carriers try generally to refute. The agency's preliminary assessment is peculiarly a matter for the agency itself. As the Court stated in a related ratemaking context, "[t]hese are matters on which experts may disagree; they involve nice issues of judgment and choice, * * * which require the exercise of informed discretion." *Panama Canal Co.*, *supra*, 356 U.S. at 317.

(ii) The Commission also considers the nature and extent of the alleged violation, the injury that may be suffered by the public and each of the parties if the agency does or does not investigate, and the suitability of the alternative complaint remedy as a means of adjudicating the rate's lawfulness and recovering damages for any actual injury. As a general rule, the Commission is more likely to begin an investigation (perhaps as the basis for suspending a rate) when the alleged violation is pervasive and significant, when it threatens to cause substantial injury to large elements of the public, and when the

[44] See Spritzer, *supra note* 42, pp. 56, 59.

prospect of a multitude of individual Section 13(1) proceedings suggests the desirability of addressing the rate's lawfulness in a single proceeding under Section 15(8). An investigation is less likely when the alleged violations seem limited in scope or duration, when any injury is likely to be minimal, and when the Section 13(1) remedy seems well-suited for resolution of the rate's lawfulness.

(iii) Legislative or agency policy may also warrant special weight in the balancing of relevant factors. When a particular rate proposal seems out of step with important ratemaking policies, the Commission may be more inclined to investigate it at the outset. Conversely, when a rate proposal is in harmony with governing policy, the Commission may be inclined to signal its receptivity to such proposals by declining to impose on the carrier the potentially significant burden of a Section 15(8) investigation, with its accompanying keep account requirement and refund liability.

(iv) The Commission may also take into account the extent of its available resources and the strict statutory time constraints associated with a Section 15(8) investigation. Like every government agency, the Commission must allocate its limited financial and personnel resources in the most efficient way possible with an eye toward fulfilling its numerous statutory obligations. It cannot responsibly ignore the comparative resource implications of beginning a Section 15(8) investigation as opposed to deferring an investigation until any Section 13(1) complaint is filed.

b. Several of these considerations were brought to bear on the Commission's decision in this case not to suspend or investigate the railroad's proposed seasonal rate increase.

First, while respondents broadly attacked the proposed increase as allegedly violative of the full spectrum of the Act's rate provisions, the railroads just as resolutely disputed those allegations (see pp. 7-8, *supra*). On the basis of the summary pleadings and scanty information before it at this preliminary stage, the Commission was unable to find that the proposed rate increase was probably unreasonable or discriminatory in violation of former Sections 1(5), 2, and 3(1) (A. 288-289).

Second, while respondents alleged that the proposed increase would result in several apparent violations of the long-and-short haul provision of former Section 4, they offered only a few specific examples relating to limited inter-territorial portions of intra-territorial grain movements (A. 160, 244, 283). The railroads disputed some of those examples and asserted that, if the rate increase in fact were to result in any long-and-short haul departures, they would take prompt steps to remedy the situation (A. 273, 293).

The Commission concluded that the evidence did not warrant action at the Section 15(8) stage (A. 288). That conclusion may have been founded on doubts that the rates would in fact violate Section 4. More likely, the Commission may have believed that any violations would be limited to isolated instances, that they would not in any event cause significant injury

to large segments of the shipping or consuming public, and that the Section 13(1) complaint procedure would afford an adequate remedy for any person actually injured and a more suitable mechanism for resolving isolated Section 4 issues. Indeed, in view of the railroads' insistence that they would voluntarily remedy any unintended Section 4 violation, the Commission may have believed that the railroads would satisfy any Section 13(1) complaints that might be filed, thereby obviating the need to conduct any investigation at all.

Third, the Commission gave weight to the Congressional policy encouraging railroad rate innovation generally and demand-sensitive pricing in particular. Congress directed the Commission in Section 202(d) of the 4R Act (which added Section 15(17) to the Interstate Commerce Act, now codified as 49 U.S.C. 10727) to establish expeditious procedures for railroads to implement rates based on seasonal or peak-period demand for rail services. Congress declared in Section 101(b) of the 4R Act that its policy was to "promote the establishment of railroad rate structures which are more sensitive to changes in the level of seasonal, regional, and shipper demand" (90 Stat. 33).

The proposed rate in this case was among the first demand-sensitive rate filings under the regulations adopted by the Commission to carry out the 4R Act provision, 49 C.F.R. 1109.10. The Commission accordingly was acutely sensitive to the Congressional policy. It stated that the rate proposal "appears to be

in general conformity with the goals of the [4R Act]" (A. 288). It emphasized that Congress had directed the agency "to establish a regulatory climate conducive to rate innovation and experimentation" (A. 289). In the end, "[w]eighing the contentions before us and the clear Congressional purpose to permit experimental ratemaking" (*ibid.*), the Commission decided not to investigate or suspend the proposed rate.

This case thus illustrates well the range of considerations that may go into a decision whether to investigate a proposed rate in advance of its effectiveness. Indeed, it provides a rare view of the Commission's application of its expert judgment. Ordinarily, these decisions are made by the Suspension and Fourth Section Board (see p. 55, *supra*) and under such extraordinary time constraints that a narrative order cannot be issued. Because of the unusual importance of this rate filing under the new demand-sensitive ratemaking procedures, the board referred this case to the full Commission, which took the opportunity to explain briefly the basis of its decision, perhaps in part to broadcast its policy of responsiveness to innovative railroad ratemaking.

c. At the heart of the court of appeals' willingness to review the Commission's decision was an erroneous assumption that would wholly disable the Commission from considering under Section 15(8) such relevant factors as the nature or extent of an alleged violation, the likelihood of substantial injury, the impact of an investigation on scarce Commission resources, or any

overriding legislative policy. The court fashioned this unprecedented rule to govern the Commission's exercise of discretion under former Section 15(8): "It is the duty of the Commission * * * to investigate substantial issues relating to the lawfulness of the proposed tariff" (A. 312).

While that rule may correctly characterize the Commission's responsibility under former Section 13(1)—which explicitly imposes on the Commission a "duty" to investigate a complaint that raises a substantial issue—there is absolutely no foundation in the statute for engrafting such a restriction on the threshold rate review function under former Section 15(8). On the contrary, "[t]he provisions of this statute breathe discretion at every pore." *Strickland* v. *Morton*, 519 F.2d 467, 469 (9th Cir. 1975). To turn the Commission's discretionary power to investigate into a carbon copy of its mandatory duty under former Section 13(1) would rob it of a flexibility that Congress obviously believed would better equip the agency to protect the public interest.[45]

[45] This is also the flaw in the Solicitor General's argument, advanced at the certiorari stage, that the Commission's decision not to begin a Section 15(8) investigation can be reviewed at the conclusion of a Section 13(1) proceeding if the decision in the Section 13(1) proceeding goes against the complaining party and if the placement of the burden of proof is critical to the outcome (Mem. for U.S., pp. 6-12). The conspicuously cumbersome procedure envisioned by the Solicitor General is bottomed on the same mistaken assumption that led the court of appeals into error—that the Commission *must* investigate a proposed rate if the rate is shown to be probably unlawful (*id.* at 12). As we have demonstrated, probable unlawfulness is an important but not necessarily controlling factor in the investigation decision.

In the absence of statutory standards by which to measure agency action, the courts are poorly suited to review the complex blend of considerations—some objective and articulable, others necessarily subjective and instinctive—that go into the Commission's decision whether to investigate. The Commission's judgment, in the context of this statute, "is not one appropriate for judicial action." *Panama Canal Co.* v. *Grace Line, Inc.*, *supra*, 356 U.S. at 317.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded with instructions to dismiss the petitions for review.

Respectfully submitted.

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STATUTORY APPENDIX

1. 49 U.S.C. 10707 provides:

§ 10707. Investigation and suspension of new rail carrier rates, classifications, rules, and practices

(a) When a new individual or joint rate or individual or joint classification, rule, or practice related to a rate is filed with the Interstate Commerce Commission by a rail carrier providing transportation subject to its jurisdiction under subchapter I of chapter 105 of this title, the Commission may begin a proceeding, on its own initiative or on complaint of an interested party, to determine whether the proposed rate, classification, rule, or practice violates this subtitle. The Commission must give reasonable notice to interested parties before beginning a proceeding under this subsection but may act without allowing an interested party to file an answer or other formal pleading in response to its decision to begin the proceeding.

(b) (1) The Commission must complete a proceeding under this section and make its final decision by the end of the 7th month after the rate, classification, rule, or practice was to become effective. However, if the Commission reports to Congress by the end of the 7th month that it cannot make a final decision by that time and explains the reason for the delay, it may take an additional 3 months to complete the proceeding and make its final decision. If the Commission does not reach a final decision within the applicable time period, the rate, classification, rule, or practice—

(A) is effective at the end of that time period; or

(B) if already in effect at the end of that time period, remains in effect.

(2) If an interested party has filed a complaint under subsection (a) of this section, the Commission may set aside a rate, classification, rule, or practice that has become effective under this section if the Commission finds it to be in violation of this chapter.

(c)(1) Pending final Commission action in a proceeding under subsection (a) of this section, the Commission may suspend the proposed rate, classification, rule, or practice for 7 months after the time it would otherwise go into effect or, if a report is made under subsection (b) of this section, for 10 months after the time it would otherwise go into effect. However, the Commission may suspend a rate under this subsection only if it appears from specific facts shown by the verified complaint of a person that—

(A) without suspension, the proposed rate change will cause substantial injury to the complainant or the party represented by the complainant; and

(B) it is likely that the complainant will prevail on the merits.

(2) The burden is on the complainant to prove the facts required under paragraph (1)(A) and (B) of this subsection.

(d) If the Commission does not suspend a proposed rate increase that is the subject of a proceeding under this section, the Commission shall require the rail carriers involved to account for

all amounts received under the increase until the Commission completes the proceeding or until 7 months after the increase becomes effective, whichever occurs first, or, if the proceeding is extended under subsection (b) of this section, until the Commission completes the proceeding or until 10 months after the increase becomes effective, whichever occurs first. The accounting must specify by whom and for whom the amounts are paid. When the Commission takes final action, it shall require the carrier to refund to the person for whom the amounts were paid that part of the increased rate found to be unjustified, plus interest at a rate equal to the average yield (on the date the proposed increase is filed) of marketable securities of the United States Government having a duration of 90 days. When any part of a proposed rate decrease is suspended and later found to comply with this subtitle, the rail carrier may refund any part of the portion of the decrease found to comply with this subtitle if the carrier makes the refund available equally to the shippers who participate in the rate according to the relative amounts of traffic shipped at that rate.

(e) In a proceeding under this section, the burden is on the carrier proposing the changed rate, classification, rule, or practice to prove that the change is reasonable. The Commission shall specifically consider proof that the proposed rate, rule, or practice will have a significantly adclassification rule, or practice will have a significantly adverse effect (in violation of section 10701, 10741-10744, or 11103 of this title) on the competitive posture of shippers or consignees affected by the proposed rate, classification, rule, or

practice. The Commission shall give proceedings under this section preference over all other proceedings related to rail carriers pending before it and make its decision at the earliest practical time.

3. 49 U.S.C. 11701 provides:

§ 11701. General authority

(a) The Interstate Commerce Commission may begin an investigation under this subtitle on its own initiative or on complaint. If the Commission finds that a carrier or broker is violating this subtitle, the Commission shall take appropriate action to compel compliance with this subtitle. The Commission may take that action only after giving the carrier or broker notice of the investigation and an opportunity for a proceeding.

(b) A person, including a governmental authority, may file with the Commission a complaint about a violation of this subtitle by a carrier providing, or broker for, transportation or service subject to the jurisdiction of the Commission under this subtitle. The complaint must state the facts that are the subject of the violation and, if it is against a water carrier, must be made under oath. The Commission may dismiss a complaint it determines does not state reasonable grounds for investigation and action. However, the Commission may not dismiss a complaint made against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title because of the absence of direct damage to the complainant.

(c) A formal investigative proceeding begun by the Commission under subsection (a) of this section related to a rail carrier is dismissed automatically unless it is concluded by the Commission with administrative finality by the end of the 3d year after the date on which it was begun.

3. Former Section 13(1) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 13(1), provided:

(1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

4. Former Section 15(8) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 15(8), provided:

> (8)(a) Whenever a schedule is filed with the Commission by a common carrier by railroad stating a new individual or joint rate, fare, or charge, or a new individual or joint classification, regulation, or practice affecting a rate, fare, or charge, the Commission may, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice. The hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to interested parties. Such hearing shall be completed and a final decision rendered by the Commission not later than 7 months after such rate, fare, charge, classification, regulation, or practice was scheduled to become effective, unless, prior to the expiration of such 7-month period, the Commission reports in writing to the Congress that it is unable to render a decision within such period, together with a full explanation of the reason for the delay. If such a report is made to the Congress, the final decision shall be made not later than 10 months after the date of the filing of such schedule. If the final decision of the Commission is not made within the applicable time period, the rate, fare, charge, classification, regulation, or practice shall go into effect immediately at the expiration of such time period, or shall remain in effect if it has already become effective. Such rate, fare, charge, classification, regulation, or practice may be set aside thereafter by the

> Commission if, upon complaint of an interested party, the Commission finds it to be unlawful.
>
> (b) Pending a hearing pursuant to subdivision (a), the schedule may be suspended, pursuant to subdivision (d), for 7 months beyond the time when it would otherwise go into effect, or for 10 months if the Commission makes a report to the Congress pursuant to subdivision (a), except under the following conditions:
>
> (i) in the case of a rate increase, a rate may not be suspended on the ground that it exceeds a just and reasonable level if the rate is within a limit specified in subdivision (c), except that such a rate change may be suspended under any provision of section 2, 3, or 4 of this part or, following promulgation of standards and procedures under section 1(5)(d) of this part, if the carrier is found to have market dominance, within the meaning of section 1(5)(c)(i) of this part, over the service to which such rate increase applies; or
>
> (ii) in the case of a rate decrease, a rate may not be suspended on the ground that it is below a just and reasonable level if the rate is within a limit specified in subdivision (c), except that such a rate change may be suspended under any provision of section 2, 3, or 4 of this part, or for the purposes of investigating such rate change upon a complaint that such rate change constitutes a competitive practice which is unfair, destructive, predatory or otherwise undermines competition which is necessary in the public interest.

(c) The limitations upon the Commission's power to suspend rate changes set forth in subdivisions (b)(i) and (ii) apply only to rate changes which are not of general applicability to all or substantially all classes of traffic and only if—

(i) the rate increase or decrease is filed within 2 years after the date of the enactment of this subdivision;

(ii) the common carrier by railroad notifies the Commission that it wishes to have the rate considered pursuant to this subdivision;

(iii) the aggregate of increases or decreases in any rate filed pursuant to clauses (i) and (ii) of this subdivision within the first 365 days following such date of enactment is not more than 7 per centum of the rate in effect on January 1, 1976; and

(iv) the aggregate of the increases or decreases for any rate filed pursuant to clauses (i) and (ii) of this subdivision within the second 365 day-period following such date of enactment is not more than 7 per centum of the rate in effect on January 1, 1977.

(d) The Commission may not suspend a rate under this paragraph unless it appears from specific facts shown by the verified complaint of any person that—

(i) without suspension the proposed rate change will cause substantial injury to the complainant or the party represented by such complainant; and

(ii) it is likely that such complainant will prevail on the merits.

The burden of proof shall be upon the complainant to establish the matters set forth in clauses (i) and (ii) of this subdivision. Nothing in this paragraph shall be construed as establishing a presumption that any rate increase or decrease in excess of the limits set forth in clauses (iii) or (iv) of subdivision (c) is unlawful or should be suspended.

(e) If a hearing is initiated under this paragraph with respect to a proposed increased rate, fare, or charge, and if the schedule is not suspended pending such hearing and the decision thereon, the Commission shall require the railroads involved to keep an account of all amounts received because of such increase from the date such rate, fare, or charge became effective until the Commission issues an order or until 7 months after such date, whichever first occurs, or, if the hearings are extended pursuant to subdivision (a), until an order issues or until 10 months elapse, whichever first occurs. The account shall specify by whom and on whose behalf the amounts are paid. In its final order, the Commission shall require the common carrier by railroad to refund to the person on whose behalf the amounts were paid that portion of such increased rate, fare, or charge found to be not justified, plus interest at a rate which is equal to the average yield (on the date such schedule is filed) of marketable securities of the United States which have a duration of 90 days. With respect to any proposed decreased rate, fare, or charge which is suspended, if the decrease or any part thereof is ultimately found to be lawful, the common carrier by railroad may refund any part of the portion of such decreased rate, fare, or charge

found justified if such carrier makes such a refund available on an equal basis to all shippers who participated in such rate, fare, or charge according to the relative amounts of traffic shipped at such rate, fare, or charge.

(f) In any hearing under this section, the burden of proof is on the common carrier by railroad to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable. The Commission shall specifically consider, in any such hearing, proof that such proposed changed rate, fare, charge, classification, rule, regulation, or practice will have a significantly adverse effect (in violation of section 2 or 3 of this part) on the competitive posture of shippers or consignees affected thereby. The Commission shall give such hearing and decision preference over all other matters relating to railroads pending before the Commission and shall make its decision at the earliest practicable time.

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